

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

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IN THE MATTER OF THE APPLICATIONS)	
FOR BENEFICIAL WATER USE PERMIT)	
74310-s76H BY UNIFIED INDUSTRIES)	FINAL ORDER
AND 74311-s76H BY CITY OF)	
PINESDALE)	

* * * * *

The Proposal for Decision (Proposal) in this matter was entered on June 17, 1992. Objectors Gramza filed timely exceptions to the Proposal but did not request an oral argument hearing. Applicants filed timely exceptions to the Proposal and requested an oral argument hearing. The oral argument hearing was held on January 12, 1993. Present at the oral argument hearing were Ted J. Doney, Attorney for the Applicants; Jesse L. Nuttall for the Applicants; Objector Darlene Gramza; Leo Barnett for Objector Ray Lorenz; Rhonda Gividen as an observer; Fred Robinson, Attorney for the Department of Natural Resources and Conservation (Department); and Cindy Campbell, Hearings Unit Legal Secretary. Objectors Cindy Lindskog, Norman E. Allison, and Kristy A. Allison had contacted the Hearing Examiner and explained that they could not attend the oral argument hearing but wanted their continuing objection on record.

The Proposal recommended issuance of a conditional Beneficial Water Use Permit for Application 74310-s76H by Unified Industries to appropriate 90 gpm up to 5.96 AF of water from June 16 through June 30 of each year from Sheafman Creek for municipal purposes using an existing infiltration gallery in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$

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of Section 28, Township 7 North, Range 21 West, Ravalli County, Montana. The place of storage would be a 13,500 gallon tank in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 28. The place of use would be in the SW $\frac{1}{4}$ of Section 27, the E $\frac{1}{2}$ and NW $\frac{1}{4}$ of Section 28, the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 33, and the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 34 all in Township 7 North, Range 21 West, Ravalli County, Montana. The priority date would be 9:00 a.m. October 14, 1988.

The Proposal for Decision also recommended a conditional Beneficial Water Use Permit be granted for Application 74311-s76H by City of Pinesdale to appropriate 50 gpm up to 3.31 AF of water from June 16 through June 30 of each year from Sheafman Creek for municipal purposes using an existing infiltration gallery in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 28, Township 7 North, Range 21 West, Ravalli County, Montana. The place of storage would be a 13,500 gallon tank in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 28. The place of use would be in the SW $\frac{1}{4}$ of Section 27, the E $\frac{1}{2}$ and NW $\frac{1}{4}$ of Section 28, the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 33, and the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 34, all in Township 7 North, Range 21 West, Ravalli County, Montana. The priority date would be 4:28 p.m. October 14, 1988.

At the beginning of his presentation, Mr. Doney made several corrections to his Exceptions to Proposal for Decision. The first correction was in the heading, specifically the numbers of the applications. The number of the City of Pinesdale application should have been 74311-s76H and the number for the Unified Industries application should have been 74310-s76H. On page two, third line from the bottom, the word "physically" should be

"physical." On page eight, third line from the bottom, the word "North" should be "Creek." On page nine in the heading of number five, the word "Losing" should be "Gaining." On page eleven, fifth line from the bottom, the word "in" should be "is." All of the corrections are accepted.

Mr. Doney also stated that he believed the Hearing Examiner had mistakenly omitted some land descriptions of the place of use on page six in Finding of Fact 2 and on page seven in Finding of Fact 3 as well as in the Proposed Order on pages 33 and 36, specifically the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 28 and the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 33, both in Township 7 North, Range 21 West, Ravalli County, Montana. Mr. Doney stated these descriptions were included in the Applications. A review of the Applications and of the notice that was published in the *Ravalli Republic* as well as served on certain individuals reveal that neither contain either of these land descriptions. A copy of the notice was sent to Applicants for their review. It was Applicants' duty and responsibility to make certain that the information published in the notice of the Applications was correct and conformed with the filed Applications. Mont. Admin. R. 36.12.205 (1989). Since the notice reflected the information in the Applications, Applicants did not notify the Department of errors. Therefore those legal land descriptions, the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 28 and the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 33, both in Township 7 North, Range 21 West, Ravalli County, Montana, will not be added to the place of use. If Applicants wish to have these areas in the place of use, they must file an

Application for Change of Appropriation Water Right to include the aforementioned legal land descriptions.

Applicants generally except to the Proposal for Decision which proposes to grant Permits for Application for Beneficial Water Use Permit 74311-s76H by the City of Pinesdale and Application for Beneficial Water Use Permit 74310-s76H by Unified Industries for use only from June 16 through June 30 of each year rather than from June 16 through October 31 of each year as requested in the Applications. More specifically, Applicants except to any Findings of Fact and Conclusions of Law which bear upon this issue, including Findings of Fact 14, 15, 17, and 27 through 30 and Conclusions of Law 9 through 11.

Applicants' exceptions primarily target the Hearing Examiner's Conclusion of Law 11 that unappropriated water is not available in Sheafman Creek at the proposed point of diversion during most of the proposed period of use. Conclusion of Law 11 is based on Findings of Fact 27, 28, 29, and 30. These Findings, especially 27 and 30 establish the lack of unappropriated water in Sheafman Creek. After June of every year all of the water at the intended point of diversion is under a constant call and must be left in the stream to satisfy the prior rights of downstream users. Under these circumstances, the Hearing Examiner correctly concluded that no new appropriation, no matter how small, can be permitted.

Applicants argue that Conclusion of Law 11 is not in accordance with past Department interpretations of the water

availability criteria in Mont. Code Ann. § 85-2-311 (1989). As support for their argument Applicants point to three previous Department decisions: In re Application 63907-g42M by Crisafulli (1990); In re Application 70511-s76LJ by Winter Sports, Inc. (1990); and In re Application 75737-s76H by Finlayson (1991). This reviewer has reviewed each of these cases and in each the Department considers whether there is water available at the intended point of diversion which is not en route to downstream water users. The Department does not interpret the 1989 amendments to Mont. Code Ann. § 85-2-311 to mean, as Applicants argue they mean, that if there is water present at the point of diversion there is water available for appropriation. Rather, the Department interprets the amended criteria to require that Applicants show unappropriated water is available. When, as here, water is under constant call to satisfy senior rights, unappropriated water is not available.

Applicants further contend that Conclusion of Law 11 is based on the myth that water rights equal water use. Applicants are correct that availability cannot be determined simply by comparing the total of claimed rights to flows in a drainage. Nevertheless, such evidence has probative value particularly in a small drainage like Sheafman Creek where the magnitude of error from such factors as return flows and time of use inherent in such calculations also tends to be smaller. In this case, when the findings that claimed rights so greatly exceed flows are combined with the fact that Sheafman Creek water is under

constant call after June, it becomes that much more clear unappropriated water is not available at the proposed point of diversion after June.

Applicants argue there will be no adverse effect on prior appropriators; therefore, there must be unappropriated water available. The Department, however, considers that where a senior water right holder would have to call for water every time the senior wishes to divert water, there is an adverse effect to the senior. In re Application 58432-s43A by Fredrick (1986); In re Application 53498-s41S by Ridgeway (1986). In this case, after June of every year there is a call on Sheafman Creek water even without Applicants' diversion. Applicants' diversion would place an additional stress on this already over-appropriated stream such that the effect on senior users must be considered adverse.

Applicants contend that the water proposed to be appropriated cannot be used by the Objectors. Applicants contend the water sought to be appropriated is subsurface water that is hydrologically unavailable to the downstream appropriators. The Hearing Examiner in Finding of Fact 17 finds there is a direct relationship between surface flows and underflow, and that less water in the underflow means less water in the surface flows. The record clearly shows the subsurface and surface flows of Sheafman Creek are closely related and this reviewer cannot find sufficient evidence in the record to refute the Hearing Examiner's finding concerning this hydrological relationship.

Applicants further except to a statement in Finding of Fact 17, that the stream gains flow between the infiltration galleries and the power plant tailrace. It appears the contested statement might be construed in several ways. The Hearing Examiner found in Finding of Fact 31 that "More water flows in Sheafman Creek at the downstream crossing of the Pinesdale city limits when it has flowed through the closed power plant diversion and the conveyance system than when the water flows to this point down the natural streambed." In light of Finding of Fact 31, this reviewer believes the Hearing Examiner meant that more water is present in Sheafman Creek at the tailrace when water is diverted through the hydroplant than when it flows in the natural channel. When construed in this manner, the Finding does not conflict with Applicants' augmentation argument and is supported by the record.

Applicants argue that the hydropower plant augments the flows of Sheafman Creek and that Applicants should be able to appropriate up to this amount. As stated above, the record shows that the stream between the intake and the tailrace loses surface flow when the hydropower plant is not operating; however, during the construction of the infiltration gallery under the creek channel there was disturbance of the streambed which may have altered the flow characteristics of that reach of the stream. The record is not clear whether this reach of the stream was a losing stream before construction of the creek gallery or whether disturbance of the streambed during construction is what causes this part of the stream to have a net loss of flow. At any rate

the term "augment" is not the correct term to be used in this case. "Augment" means to increase, to add to, or to supplement. By conveying the water in a closed pipe instead of the streambed, less surface water may be lost to the streambed, but the hydropower plant does not add water to the source of supply which includes both surface and subsurface flows in Sheafman Creek. The Hearing Examiner could not find sufficient evidence in the record to conclude that the closed conveyance has developed additional water, nor can this reviewer. Conclusion of Law 9 will not be modified.

Applicants excepted to Findings of Fact 14 and 15 and Conclusion of Law 10 as previously stated, but did not specifically state what their exceptions are to these portions of the Proposal except that the Findings and the Conclusion were used to conclude there were no unappropriated water in the source of supply after June 30. Findings of Fact 14 and 15 which are substantiated by the record merely state the background of the two galleries and do not address the availability of water at all. These Findings will not be modified.

Conclusion of Law 10 discusses the interconnection between the subsurface and surface water flowing in over the bed of Sheafman Creek. The Conclusion also discusses the former definition of groundwater which was in effect at the time of filing the Applications and cites Mont. Code Ann. 85-2-102(10) (1989). The discussion is correct and the Conclusion will not be modified.

Objectors Gramza responded to the Proposal for Decision in a letter received by the Department on July 10, 1992. In that letter, Darlene Gramza suggests an addition to Finding of Fact 36 stating, "Therefore we would agree to the Final Order as written, and that we understand prior to June 30 of each year. If we can't get enough water for our water right that we would have to contact the District Court or Appointed Water Commissioner." [sic] The suggested wording adds nothing of substance to the Finding and will not be added to Finding of Fact 36.

Upon review of the evidence herein and consideration of the exceptions, the Findings of Fact and Conclusions of Law are hereby adopted by the Department.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

I. Application 74310-s76H

(North Gallery)

Subject to the terms, conditions, and limitations specified below, Application for Beneficial Water Use Permit 74310-s76H is hereby granted to Unified Industries to appropriate 90 gpm up to 5.96 AF of water from June 16 through June 30 of each year from Sheafman Creek for municipal purposes using an existing infiltration gallery in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 28, Township 7 North, Range 21 West, Ravalli County, Montana. The place of storage shall be a 13,500 gallon tank in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 28. The place of use shall be in the SW $\frac{1}{4}$ of Section 27, the E $\frac{1}{2}$

and NW $\frac{1}{4}$ of Section 28, the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 33, and the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 34 all in Township 7 North, Range 21 West, Ravalli County, Montana. The priority date shall be 9:00 a.m. October 4, 1988.

This permit is subject to the following conditions:

A. The water right granted by this permit is subject to the authority of court appointed water commissioners, if and when appointed, to admeasure and distribute to the parties using water in the source of supply the water to which they are entitled. The permittee shall pay its proportionate share of the fees and compensation and expenses, as fixed by the court, incurred in the distribution of the waters granted in this provisional permit.

B. This permit is used in conjunction with Permit to Appropriate Water 74311-s76H. The combined appropriation of the two diversions as granted shall not exceed a total of 140 gallons per minute up to 9.27 acre-feet from June 16 through June 30 of each year.

C. This permit is used in conjunction with Certificate of Water Right 4858-g76H which authorizes the certificate holder to divert ground water only. The combined appropriation under Permit 74310-s76H and Certificate 4858-g76H shall not exceed a flow rate of 90 gallons per minute and shall not exceed a volume of 5.86 acre-feet from June 16 through June 30 of each year.

D. This permit is supplemental to seven Statements of Claims to Existing Water Rights (listed below) and Permit to Appropriate Water 74311-s76H which means they are for the same

purpose and have overlapping places of use. Whenever supplemental water rights are combined to supply water for municipal use, each is limited to the flow rate and volume of the individual right, and the combined total flow rate and volume shall not exceed the amount necessary for beneficial use.

The Statements of Claims to Existing Water Rights are:

76H-W002106-00	76H-W002689-00
76H-W002654-00	76H-W002691-00
76H-W002659-00	76H-W152102-00
76H-W002683-00	

E. This permit is subject to the condition that the permittee shall install and maintain adequate continuously reading flow measuring devices in order to allow the flow rate and volume of all water diverted to be recorded. The devices must be placed so that water cannot be diverted without being measured and recorded, as certified by a licensed plumber or engineer. Bypass or pressure relief lines, if necessary, must convey water through an alternative measuring mechanism or to the source. The permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records on demand and by November 30 of each year to the Missoula Water Resources Regional Office.

F. This permit is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the permittee to the detriment of any prior appropriator.

G. If, at any time after this permit is issued, a written complaint is received by the Department alleging that diverting from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If during the field investigation the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the permittee to show cause why the permit should not be modified or revoked. The Department may then modify or revoke the permit to protect existing water rights or allow the permit to continue unchanged if the hearings officer determines that no existing water rights are being adversely affected.

H. The issuance of this permit by the Department shall not reduce the permittee's liability for damages caused by permittee's exercise of this permit, nor does the Department in issuing the permit in any way acknowledge liability for damage caused by the permittee's exercise of this permit.

I. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Mont. Code Ann. § 85-2-424 (1991).

II. Application 74311-s76H

(Creek Gallery)

Subject to the terms, conditions, and limitations specified below, Application for Beneficial Water Use Permit 74311-s76H is

hereby granted to the City of Pinesdale to appropriate 50 gpm up to 3.31 AF of water from June 16 through June 30 of each year from Sheafman Creek for municipal purposes using an existing infiltration gallery in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 28, Township 7 North, Range 21 West, Ravalli County, Montana. The place of storage shall be a 13,500 gallon tank in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 28. The place of use shall be in the SW $\frac{1}{4}$ of Section 27, the E $\frac{1}{2}$ and NW $\frac{1}{4}$ of Section 28, the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 33, and the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 34 all in Township 7 North, Range 21 West, Ravalli County, Montana. The priority date shall be 4:28 p.m. October 14, 1988.

This permit is subject to the following conditions:

A. The water right granted by this permit is subject to the authority of court appointed water commissioners, if and when appointed, to admeasure and distribute to the parties using water in the source of supply the water to which they are entitled. The permittee shall pay its proportionate share of the fees and compensation and expenses, as fixed by the court, incurred in the distribution of the waters granted in this provisional permit.

B. This permit is used in conjunction with Permit to Appropriate Water 74310-s76H. The combined appropriation of the two diversions as granted shall not exceed a total of 140 gallons per minute up to 9.27 acre-feet from June 16 through June 30 of each year.

C. This permit is supplemental to seven Statements of Claims to Existing Water Rights (listed below) and Permit to

Appropriate Water 74310-s76H which means they are for the same purpose and have overlapping places of use. Whenever supplemental water rights are combined to supply water for municipal use, each is limited to the flow rate and volume of the individual right, and the combined total flow rate and volume shall not exceed the amount necessary for beneficial use.

The Statements of Claims to Existing Water Rights are:

76H-W002106-00	76H-W002689-00
76H-W002654-00	76H-W002691-00
76H-W002659-00	76H-W152102-00
76H-W002683-00	

D. This permit is subject to the condition that the permittee shall install and maintain adequate continuously reading flow measuring devices in order to allow the flow rate and volume of all water diverted to be recorded. The devices must be placed so that water cannot be diverted without being measured and recorded. Bypass or pressure relief lines, if necessary, must convey water through an alternative measuring mechanism or to the source. The permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records on demand and by November 30 of each year to the Missoula Water Resources Regional Office.

E. This permit is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the permittee to the detriment of any prior appropriator.

F. If, at any time after this permit is issued, a written complaint is received by the Department alleging that diverting from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If during the field investigation the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the permittee to show cause why the permit should not be modified or revoked. The Department may then modify or revoke the permit to protect existing water rights or allow the permit to continue unchanged if the hearings officer determines that no existing water rights are being adversely affected.

G. Issuance of this permit shall not reduce the permittee's liability for damages caused by exercise of this permit, nor does the Department, in issuing this permit, acknowledge any liability for damages caused by exercise of this permit, even if such damage is a necessary and unavoidable consequence of the same.

H. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Mont. Code Ann. § 85-2-424 (1991).


NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a

petition in the appropriate court within 30 days after service of the Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for the ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the oral proceedings to the district court.

Dated this 8th day of March, 1993.


Vivian A. Lighthizer
Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 8th day of March, 1993, as follows:

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c/o Jess Nuttall
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Pinesdale, MT 59841

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